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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICHARD S. RAMOS,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. C 01-21148-RS

ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS (Doc. 11)

I. INTRODUCTION

Defendant United States moves to dismiss the complaint of Richard S. Ramos for lack of subject matter jurisdiction. The complaint was filed December 11, 2001, seeking damages pursuant to 26 U.S.C. § 7433. Defendant claims that the Court is without subject matter jurisdiction to hear this claim because the statute of limitations has expired. The parties fully briefed the motion and appeared for oral argument on July 24, 2002. The parties filed post-argument supplemental briefs to address questions raised at oral argument. For the reasons set forth below, defendant's motion to dismiss is denied.

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II. BACKGROUND

On January 28, 1998, plaintiff filed a complaint in District Court to quiet title to allegedly improper levies filed by the Internal Revenue Service (“IRS”). At trial in that action, held December 15-17, 1998, the government admitted that four IRS seizures were in fact illegal. Those four seizures totaled \$1710.08. In the findings of fact and conclusions of law issued July 15, 1999, the presiding judge ruled that “the return of those illegally seized monies cannot be had in a quiet title action. Recourse is pursuant to 26 U.S.C. section 7433.” On December 11, 2001, plaintiff filed a complaint seeking the return of this money pursuant to 26 U.S.C. § 7433. Defendant now moves to dismiss the complaint for lack of subject matter jurisdiction.

III. STANDARDS

A. Lack of Subject Matter Jurisdiction under Fed. R. Civ. P. 12(b)(1)

On a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff must prove jurisdiction in order to survive the motion. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). “When considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1998). “A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits. In such circumstances, no presumption of truthfulness attaches to the plaintiff’s allegations.” Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987) (citations omitted).

B. Failure to State a Claim under Fed. R. Civ. P. 12(b)(6)

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all facts alleged in the complaint are taken as true in the light most favorable to the plaintiff. Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). The Court must “draw all reasonable inferences in favor of the non-moving party.” Salim v. Lee, 202 F. Supp. 2d 1122, 1125 (C.D. Cal. 2002). Dismissal is proper “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73

(1984). “A district court is not entirely limited to considering facts in the complaint. Facts subject to judicial notice may be considered on a motion to dismiss.” Biagro Western Sales, Inc. v. Helena Chem.Co., 160 F. Supp. 2d 1136, 1140 (E.D. Cal. 2001). “Where the Plaintiff is a pro se litigant, the court is particularly liberal in construing the complaint in his favor.” Moore v. United States, 193 F.R.D. 647, 651 (N.D. Cal. 2000) (citation omitted).

IV. ANALYSIS

A. Rule 12(b)(1) does not Apply to Statutes which Permit Equitable Tolling

Defendant characterizes its motion as one to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Defendant argues that “[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit. A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms.” (Def.’s Mot. to Dismiss at 3) (citations omitted) (internal quotations omitted). Defendant argues that as a matter of law that the statute of limitations in this case has run, and therefore the Court is without jurisdiction to hear plaintiff’s claim. As more fully explained below, however, recent Supreme Court and Ninth Circuit decisions cast doubt on the proposition that statutes waiving sovereign immunity and setting forth limitations to bring suit implicate jurisdictional concerns at the motion to dismiss stage when the statute is subject to equitable tolling.

In the Supreme Court case of Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), Chief Justice Rehnquist announced “a more general rule to govern the applicability of equitable tolling in suits against the Government.” Id. at 95. The Court held that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.” Id. at 95-96. The Ninth Circuit interprets Irwin to mean that “federal statutory time limitations on suits against the government are not jurisdictional in nature.” Washington v. Garrett, 10 F.3d 1421, 1437 (9th Cir. 1993). In Supermail Cargo v. United States, 68 F.3d 1204 (9th Cir. 1995), the court ruled that the district court erred when dismissing a non-taxpayer claim against the IRS filed pursuant to 26 U.S.C. § 7426, which authorizes a third party to bring suit against the government for wrongful

1 levy. The Court of Appeals ruled that the question of whether the statute of limitations had run was
2 *not* a jurisdictional issue, and “should have been raised through a Rule 12(b)(6) motion to dismiss for
3 failure to state a claim, not a Rule 12(b)(1) motion to dismiss for lack of jurisdiction.” *Id.* at 1206
4 n.3. The general principle to be divined from *Irwin* and its progeny is straight forward: if a statute
5 of limitations on a claim against the government is subject to equitable tolling, the statute of
6 limitations issue cannot be resolved on a 12(b)(1) motion. *See Supermail Cargo v. United States*, 68
7 F.3d 1204 (9th Cir. 1995); *Hughes v. United States*, 263 F.3d 272 (3d Cir. 2001) (ruling that because
8 the statute of limitations under the Federal Tort Claims Act is not jurisdictional, the district court,
9 when considering matters outside of the pleadings, should have used the summary judgment standard
10 instead of resolving the motion under Rule 12(b)(1)). However, when equitable tolling of a statute
11 of limitations is not permitted because of the highly technical nature of the claims process under the
12 statute, a court may decide the statute of limitations issue under Rule 12(b)(1). *See Jordan Hosp.,*
13 *Inc. v. Shalala*, 276 F.3d 72 (1st Cir. 2002) (ruling that the district court properly dismissed a claim
14 under the Medicare Act pursuant to Rule 12(b)(1) where the Act did not permit equitable tolling).

15 **B. 26 U.S.C. § 7433 Permits Equitable Tolling**

16 In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court refined the doctrine
17 announced in *Irwin*, that equitable tolling is presumed unless otherwise stated by Congress, and ruled
18 that equitable tolling is not permitted when a statute “uses language that is not simple . . . [and] sets
19 forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily
20 be read as containing implicit exceptions.” *Id.* at 350. To characterize properly defendant’s motion
21 under this principle, the Court must determine whether equitable tolling of 26 U.S.C. § 7433 is
22 permitted in light of *Brockamp* and *Irwin*. The time period to bring a claim as set forth by Congress
23 under Section 7433(d)(3) is uncomplicated: “an action . . . may be brought only within 2 years after
24 the date the right of action accrues.” This limitations period is more akin to the statute of limitations
25 found in *Irwin* than the complicated statutory scheme found in *Brockamp*. Although the regulations
26 underlying Section 7433(d)(3) provide a detailed procedure for filing a claim,¹ these regulations do
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28 ¹ *See* 26 C.F.R. § 301.7433-1(d).

not evince an intent on the part of *Congress* to alter its waiver of sovereign immunity. As the *Irwin* Court held: “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. *Congress*, of course, may provide otherwise if it wishes to do so.” *Irwin*, 498 U.S. at 95-96 (emphasis added). The text of Section 7433(d)(3) does not indicate that Congress otherwise provided against the presumption that equitable tolling is allowed. Post-*Irwin* decisions permit equitable tolling under Section 7433(d)(3). See *United States v. Mansour*, 1997 U.S. Dist. LEXIS 15003, at *11 (D. Conn. 1997). The only post-*Brockamp* decision to address squarely whether Section 7433(d)(3) permits equitable tolling answered the question in the affirmative. See *United States v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Hawaii 2000); see also *Wise v. Commissioner*, 168 F. Supp. 2d 649, 653 (S.D. Tex. 2001) (leaving open the general question of whether equitable tolling is allowed under Section 7433 and ruling that even if tolling were available, the facts did not warrant application of the doctrine). Section 7433(d)(3), therefore, is subject to equitable tolling and a complaint alleging violation of that section cannot be resolved on a motion to dismiss pursuant to Rule 12(b)(1).² The Court treats defendant’s motion as one to dismiss pursuant to Rule 12(b)(6).³

C. Rule 12(b)(6) Analysis of Plaintiff’s Complaint

Plaintiff brings suit pursuant to 26 U.S.C. § 7433 alleging the impropriety of four IRS seizures totaling \$1710.08. These seizures took place between December of 1995 and August of 1996. Plaintiff alleges that he first discovered the improper seizures when an attorney for the government admitted in open court that the monies were improperly seized. This admission

² The government argues that allowing equitable tolling of Section 7433 “could open the floodgates to countless suits brought by disgruntled taxpayers many years after the expiration of the time limitation set forth in Section 7433(d)(3).” As the *Irwin* Court instructs, however, should such a consequence ensue, Congress, not the judiciary, has the power to stop any flood of litigation by amending the statute to abrogate tolling.

³ The parties have submitted materials outside of the pleadings. When such matters are presented, but not excluded by the court, a Rule 12(b)(6) motion shall be treated as one for summary judgment. Fed. R. Civ. P. 12(b). In this instance, to afford the parties an opportunity to make a more developed motion for summary judgment, the Court excludes all matters outside of the pleadings and decides this motion pursuant to Rule 12(b)(6).

indisputably occurred on December 15 or 17, 1998.⁴ On August 9, 1999, plaintiff filed a claim for refund with the IRS seeking return of the improperly seized money. Plaintiff alleges that this administrative claim was denied on September 28, 2001.

“A motion to dismiss based on the running of the statute of limitations period may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled. In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.” Supermail Cargo v. United States, 68 F.3d 1204, 1206-07 (9th Cir. 1995) (internal quotation omitted) (citations omitted). In this case, plaintiff may well be able to prove that in the course of his administrative claim, the government made representations which would permit tolling of the statute of limitations. Given the liberal notice pleading requirements of Rule 8(a)(2), plaintiff is not required to set forth facts affirmatively related to equitable tolling. The sole inquiry is whether the complaint sets forth a set of facts which could bear the application of equitable tolling. Plaintiff has met this pleading burden. Defendant has not demonstrated as a matter of law that the complaint fails to state a claim because the statute of limitations has run.

Accordingly, it is, hereby,

ORDERED:

(1) Defendant’s Motion to Dismiss is DENIED.

(2) The parties shall appear for a Case Management Conference on December 4, 2002 at 1:30 P.M. The parties are further ordered to file a Joint Case Management Conference Statement no later than November 27, 2002.

IT IS SO ORDERED.

DATED: November 1, 2002

/s/ Richard Seeborg
RICHARD SEEBORG
UNITED STATES MAGISTRATE JUDGE

⁴ Plaintiff alleges that the admission took place in April or May of 1999 during the trial of his previous quiet title action. (Compl. at 2:13.) Plaintiff’s allegation of the timing of this admission appears to be an inadvertent misstatement. The Court takes judicial notice, pursuant to Fed. R. Evid. 201(c), that plaintiff’s quiet title trial took place between December 15-17, 1998. Case No. C-98-20082, Docket Nos. 22, 23.

United States District Court

For the Northern District of California

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